(33,581)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 272

W. A. MARSHALL & CO., INC., PETITIONER,

vs.

STEAMSHIP "PRESIDENT ARTHUR," HER ENGINES, BOILERS, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

W. A. Marshall & Co., Inc., Libellant-Appellant,

against

Steamship "President Arthur," Her Engines, Boilers, etc., Claimant-Appellee

Statement

1925.

May 11. Libel filed. S. S. "President Arthur" arrested.

June 13. Answer filed.

1926.

May 6. Order entered substituting Lampke & Stein for Krieger, Stutsky, Rush & Friedman as proctors for claimant.

Sept. 14. Amended answer filed.

1927.

June 3. Trial before Thacher, J.

Sept. 13. Opinion rendered directing dismissal of libel.

Oct. 10. Final decree entered dismissing libel.

Nov. 19. Notice of Appeal, Assignment of Errors and Bond filed.

[fol. 2] In United States District Court

Libel

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The libel of W. A. Marshall & Co., Inc., against the Steamship "President Arthur," her engines, boilers, etc., in a cause of contract, civil and maritime, alleges upon information and belief and respectfully shows to this Honorable Court as follows:

First. At all times hereinafter mentioned libellant was and still is a corporation organized and existing under and

by virtue of the laws of the State of New York, having an office and place of business at 17 Battery Place, in the Borough of Manhattan, City, County and State of New York, and engaged in the business of supplying coal.

Second. The Steamship "President Arthur" is now within this district and within the jurisdiction of this Honorable Court.

Third. During the month of March, 1925, at the port of New York, libelant, upon the request of the owner of the Steamship "President Arthur," or a person authorized by the owner thereof, furnished to and for the use of said steamship about 4,150 tons of bunker coal at an agreed price of $21,173.16, which price was the reasonable market price for said coal. The said coal was necessary to enable the steamship to perform her intended voyage.

Fourth. The owner of the steamship "President Arthur" paid to libellant the sum of $11,790.54 on account of the pur- [fol. 3] chase of said coal, but has failed to pay the balance thereof, and by reason of the premises there is now due and owing to the libelant from the said Steamship "President Arthur" the sum of $9,382.62, no part of which has been paid, although the same has been duly demanded, and the libelant has a lien therefor under and by virtue of the Act of Congress known as the Merchant Marine Act, approved June 5, 1920, and also under and by virtue of the General Maritime Law.

Fifth. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore libelant prays that process in due form of law may issue against said Steamship "President Arthur," her engines, boilers, tackle, apparel and furniture, and that all persons having or claiming to have any interest therein may be cited to appear and answer all and singular the matters aforesaid, and that this court will be pleased to award to the libelant its damages aforesaid with interest and costs, and that the said Steamship "President Arthur," her engines, boilers, tackle, apparel and furniture may be condemned and sold to pay the same, and that libelant may

have such other and further relief in the premises as it may be entitled to receive.

George W. Hinckley, Proctor for Libelant. Office and Post Office address: B-10 Produce Exchange Building, New York City.

[fol. 4] *Duly sworn to by Wilbur A. Marshall. Jurat omitted in printing.*

[fol. 5] In United States District Court

Amended Answer

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The answer of American Palestine Line, Inc., the claimant of the Steamship "President Arthur," to the libel and complaint of W. A. Marshall & Co., Inc., in an alleged cause of contract, civil and maritime, respectfully shows:

First. Admits the allegations in Paragraph First and Second of the libel.

Second. On information and belief admits that in and during the month of March, 1925, the libellant furnished to and for the use of the Steamship "President Arthur," bunker coal, which coal was necessary to enable the Steamship to perform her intended voyage, but except as thus admitted, denies each and every allegation in paragraph marked "3" in said libel contained.

Third. On information and belief admits that the claimant paid to libellant the sum of $11,794.54, but except as thus admitted, denies the balance of the allegations in said paragraph contained and expressly alleges that the entire purchase price of the said coal was paid to the libellant by claimant by the delivery to it of two trade acceptances endorsed by third parties required by the contract to be given as complete payment for the said coal and upon the delivery of said trade acceptances all claims of plaintiff were paid and extinguished and any maritime lien had or claimed to be had by plaintiff was thereupon extinguished and terminated.

Fourth. Admits the jurisdiction of the United States and of this Honorable Court, but denies the remaining allega-
[fol. 6] tions in paragraph of the libel numbered Fifth.

Fifth. Further answering and by way of set-off, the claimant alleges, on information and belief, that heretofore on or about the 18th day of February, 1925, and the 4th day of March, 1925, the libellant and claimant entered into two separate agreements in writing for the purchase by claimant of approximately 4,225 gross tons of bituminous coal to be used as bunker fuel for the Steamship "President Arthur." And it was further, as a part of said written contracts, expressly warranted by libellant that said coal should be approximately 50% Bethel coal and 50% Melcroft coal, and further expressly warranted in writing as follows:

Bethel

"Bethel is Miller Vein coal having the usual characteristics of this seam in the South Fork and Scalp Level districts, which it adjoins.

The seam is absolutely clean, being free from any sign of slate or bone partings. Bethel is deep mined, contains no stained or crop coal and is excellent in appearance. It is soft by nature and does not run lumpy.

The coal analyzes as shipped approximately 16% Volatile, 76.25% fixed carbon, 6.75% Ash, 1.85% Sulphur, 14,750 B. T. U.'s and 2350° Fusing Temperature of Ash.

Bethel is regarded as a fancy grade of smokeless steam coal because of its low volatile and ash content and high heating value. It is an extremely hot coal and is unexcelled as a steam producer. It makes little or no smoke and
[fol. 7] comes within all smoke ordinance requirements."

Melcroft

"Producing Miller vein coal of unusual quality, cleanliness and uniformity. The seam being clean, carrying no parting of slate or bone, assures uniform quality at all times.

The coal analyzes as shipped, approximately 25.00% of volatile, 8.50% ash, 1.75% Sulphur, 14,300 B. T. U.'s and 2,500° Fusing Temperature of Ash.

The Volatile matter at 25.00% makes a quick, hot fire enabling a plant to meet sudden loads and hold the steam under excessive conditions. Yet the volatile is not sufficiently high to cause consumption to be high or cause complaint from smoke. It is unsurpassed for bunker fuel.

The sulphur being free from iron, this coal can be forced under any condition without causing clinker trouble.

In over a year not one report of clinker has been received; on the contrary the comment has been frequently made on its freedom from clinker. This experience is from over 100,000 tons handled in the past twelve months."

Sixth. Upon information and belief that the coal actually furnished "President Arthur" did not analyze as aforesaid, but on the contrary showed a much higher percentage of volatile, a much lower percentage of fixed carbon and a much higher percentage of ash and sulphur, and a very much lower number of British Thermal Units, which rendered said coal different from the coal warranted, and required a much larger consumption of tons of coal per day, [fol. 8] making it necessary for the claimant to purchase additional coal, all to its damage in the sum of Ten thousand ($10,000.00) Dollars, and claimant asks that this sum be offset against any sum which may be found to be due libellant.

Seventh. Further answering, claimant states on information and belief that heretofore and on or about the 18th day of June, 1925, the libellant had in its possession a certain trade acceptance provided in said contract to be delivered to it in payment for the balance of said coal and in the same amount as that mentioned in the libel and for which amount libellant seeks recovery. Said trade acceptance being endorsed as provided for in said contract by J. W. Gottlieb, Jacob Wacht and Jacob S. Strahl, the said libellant then and there elected to treat the said trade acceptance as payment of the sums due it for said coal and on that day, commenced an action to recover thereon in the Supreme Court, New York County, against the said J. W. Gottlieb, Jacob Wacht and Jacob S. Strahl, which action is still pending and undetermined, and claimant alleges that any maritime lien which the libellant had or could have had

was extinguished or suspended during the pendency of said action.

All and singular the premises are true.

Wherefore respondent prays that the libel may be dismissed with costs and for such other and further relief as may be just.

Lampke & Stein, Proctors for Respondent. Office and Post Office address: No. 29 Broadway, Borough of Manhattan, City of New York.

[fol. 9] *Duly sworn to by Joseph K. Guerin. Jurat omitted in printing.*

(NOTE.—The amended answer as filed pursuant to stipulation was not verified.)

[fol. 10] IN UNITED STATES DISTRICT COURT

[Title omitted]

Before Hon. Thos. D. Thacher, District Judge

Case

New York, June 3, 1927.

APPEARANCES OF COUNSEL.

George W. Hinckley, for Libellant;
Chauncey E. Treadwell, for Respondent.

The claims of the libel and answer are stated.

C. W. SANFORD, being duly sworn and examined as a witness for the libellant, testifies:

Direct examination by Mr. Hinckley:

Q. In the month of February, 1925, by whom were you employed?

A. W. A. Marshall & Company.

Q. In what capacity?

A. As tide water sales manager.

Q. And in connection with your employment did you negotiate any contracts of sale between W. A. Marshall & Company and the American-Palestine Line as owner of the [fol. 11] steamer "President Arthur"?

A. I did.

Q. I hand you this contract and ask you if this was one of the contracts that you negotiated?

A. It was, yes.

Q. You saw this contract signed by the Treasurer of the American-Palestine Line?

A. Yes.

It is offered in evidence and marked Libellant's Exhibit 1 of this date.

Q. I want to call your attention to one paragraph in this contract. "The coal is not to be dumped from the railroad cars into barges until the seller receives written notice from the buyer either that it waives its right to analyze the coal, or has analyzed it and found it satisfactory and directs its dumping." That provision was arranged between you and pursuant to authority was this letter sent to you by the American-Palestine Line (showing witness paper)?

A. Yes, it was.

The letter is offered in evidence, dated Feb. 19, 1925, to Marshall, and marked Libellant's Exhibit 2 of this date.

Q. Subsequently to this contract of February 18, Libellant's Exhibit 1, was a further contract negotiated between you and the American-Palestine Line?

A. Yes, sir.

Q. I hand you a paper and ask you if that is that contract?

A. Yes, sir.

It is offered in evidence and marked Libellant's Exhibit 3 of this date, letter dated March 4, 1925, to the American-Palestine Line.

[fol. 12] Q. And at the time that contract was signed was that letter signed by Epstein as General Manager of the American-Palestine Line delivered to you?

A. Yes, sir.

The letter last referred to, dated March 4, 1925, to Marshall, is offered in evidence and marked Libellant's Exhibit 4 of this date.

Q. Pursuant to those contracts did W. A. Marshall & Company actually deliver the coal to the steamship "President Arthur"?

A. They did.

Q. I hand you herewith certificate of weight and origin of coal, and ask if the coal as outlined in that certificate of weight and origin was actually delivered to the "President Arthur"?

A. It was.

Q. What was that weight?

A. 4,151 tons and 12 cwt.

Q. And these are the bills of lading of those barges?

A. Yes.

The railroad receipts are offered in evidence and marked Libellant's Exhibit 5 of this date.

The bills of lading of the barges are offered in evidence and marked Libellant's Exhibit 6 of this date.

Q. Do you know when the last of the coal was delivered alongside the "President Arthur," within a day or so?

A. About March 6th.

Q. And what year was that?

A. That was 1925.

Mr. Hinckley: Mr. Treadwell, will you concede that the origin of the coal is as stated in these railroad certificates? [fol. 13] Mr. Treadwell: I won't make any specific concession because I don't know.

A stipulation is read into the record as follows:

Claimant consents that the railroad bills of lading and the certificates showing daily shipments of coal in question may be received in evidence as prima facie proof of the statements in the bills of lading.

Q. I hand you herewith some papers that purport to be the daily report of daily shipments from the Maple Ridge Coal Company and ask if they show shipments of coal delivered to the "President Arthur"?

A. They do.

Q. Are the cars that are checked in lead pencil by number the cars on which that coal came?

A. Yes.

Q. And is the number 3 as designated on those slips Bethel coal?

A. Yes.

The slips are offered in evidence and marked Libellant's Exhibit 7 of this date.

Q. I hand you certificate from Melcroft Coal certifying coal by car numbers, and ask you if those numbers are the numbers of the cars that were dumped into the lighters alongside of the "President Arthur."

A. They are.

The certificates are offered in evidence and marked Libellant's Exhibit 8 of this date.

Q. Mr. Sanford, when you first entered negotiations for the sale of this coal to the American-Palestine Line, what was said about the time the coal should be paid for?

[fol. 14] A. As I recollect it they wanted to pay for this coal in thirty days, and—no, our terms were thirty days, and they wanted a longer period; naturally I had to put that up to our Credit Department, and by their wanting a longer period than thirty days they looked further into their financial standing and came to the conclusion that they didn't like the account and wanted to get trade acceptances in order to get the money at any time that they wanted—in fact to discount that paper. When that question came up we wanted additional security, as we weren't satisfied with the credit of the American-Palestine Line.

Q. The purpose in getting these trade acceptances was, was it not, so that Marshall & Company by the use of these trade acceptances could obtain the benefit of the financing prior to the deferred time of payment arranged in the contract?

Objected to.

Objection sustained.

Q. Did you or did you not know that where bunker coal is supplied to a ship on the order of the owner that the

supplier has a lien against the ship for the value of such coal?

Objected to.
Objection sustained.
Exception.

After argument, the court says he will take the testimony but will disregard it.

Q. I will repeat the question: Were you or were you not of the opinion that you had a maritime lien for the supplying of coal ordered by the owner for the bunkers of a vessel?

A. Yes.

[fol. 15] Q. Is it or is it not a usual custom in the coal business, where time of payment is deferred, for the seller to draw upon the buyer and for the buyer to accept the draft and return it to the seller at some deferred time?

Objected to.
Objection sustained.
Exception.

Q. Is it or is it not the custom in the coal trade when supplying bunkers for steamers and there is to be a deferred date of payment, for the seller to receive a draft which it in turn discounts at the bank prior to the date of payment?

Objected to.
Objection sustained.
Exception.

Q. Was the requirement made by W. A. Marshall & Company that this draft should be endorsed by the parties named in the contract for the purpose of making the draft more negotiable at the bank?

Same objection.

The Court: I will assume it was so and let it stand.

A. It was.

Q. Was anything ever said during the time of the negotiations for this contract, or at the signing, as to the

abandonment of any lien or claim that Marshall & Company might have against a ship for supply of bunkers?

A. No.

[fol. 16] Cross-examined by Mr. Treadwell:

Q. You wrote this letter, which I produce, on the paper of your attorney Mr. Hinckley, February 16, 1925, did you not, Mr. Sanford?

A. Yes, I wrote that letter.

It is offered in evidence.

Marked Claimant's Exhibit A of this date.

Q. In that letter you said that the drafts must be endorsed by responsible persons acceptable to you, did you not?

A. Yes, sir.

Q. Who were those persons?

A. A party by the name of Wacht, one by the name of Gottlieb, and Jacob S. Strahl.

Q. And they were acceptable to you?

A. They were acceptable to me.

Q. You had them investigated?

A. As far as I know we did; that comes under our Credit Department; that I know, they were acceptable anyway.

Q. I show you a draft produced by your proctor, dated March 6, 1925; is that the draft for the amount of which you are bringing suit here?

Objected to; the papers speak for themselves.

The Court: He may identify it with the transaction.

A. Yes, that is it.

Q. That is the second draft mentioned in these contracts?

A. Yes, sir.

Q. And the first draft was paid?

A. Yes, sir.

Q. And the second draft was given——

A. It was a trade acceptance.

[fol. 17] The paper referred to is offered in evidence and marked Claimant's Exhibit B of this date.

Q. You also made an affidavit?

A. Our attorney, Mr. Hinckley, just mentioned that a moment ago, didn't he?

Q. Do you remember making an affidavit?

A. No, I don't remember it.

Q. I will show it to you. It is on the office paper of your proctor here (showing witness paper).

A. Yes.

Q. You remember it now?

A. Yes.

Q. And when you swore to it you believed it to be true?

A. Yes.

The affidavit referred to is offered in evidence and marked Claimant's Exhibit C of this date.

Q. You said in that affidavit—I quote here the following sentence from that letter—that is the letter I showed you before—that the court may observe one of the essential terms in the offer—and then you quote the part of the letter about the trade acceptances, and then you say "these trade acceptances to be endorsed by responsible persons acceptable to us." Now, you did believe that was an essential term of the contract, that the trade acceptances should be endorsed by responsible persons?

A. We did that for an additional protection; we didn't believe that the American-Palestine Line was financially responsible, and we insisted upon those endorsements on there so that we could discount that paper in case we needed to at any time.

[fol. 18] Q. Well, you did discount it, didn't you?

A. I don't think so.

Q. You don't?

A. No.

Q. And you brought a suit against these endorsers?

A. Yes, sir.

Q. And you made this affidavit in that suit?

A. I don't know just when that affidavit was made; Mr. Hinckley can tell you that.

Mr. Hinckley: The fact is conceded and it is also conceded that the action is pending and undetermined.

Mr. Treadwell: Yes. I offer in evidence affidavit of George W. Hinckley, proctor for the libellant, in the same set of papers. It is expressly stated in the affidavit that payment was to be made by these endorsers, that they would never have made the contract if the endorsements had not been there, and that they were not accommodation endorsers as claimed by the defendant in that action, but that the endorsements were accepted as payment of the obligation. It is stated in so many words.

Mr. Hinckley: Objected to; not that I deny that I made the affidavit, but admissions that I might make as attorney in another action I don't think can be binding as an admission of the plaintiff as to what he did in this action.

The Court: I will receive it—it is taken subject to the objection.

The affidavit referred to is offered in evidence and marked Claimant's Exhibit D of this date.

[fol. 19] By Mr. Hinckley:

Q. The purpose in securing these endorsers to these drafts was in order that you might negotiate it through a bank more readily than if you did not have it?

A. Yes, we couldn't negotiate the American-Palestine Line's notes.

Q. So that if necessary you might be in funds prior to the day ultimately stated for payment?

A. Yes.

Q. And that was the sole purpose of having this draft endorsed, was it not?

Objected to.

Objection overruled.

A. Yes, sir.

Q. What was the value of coal as delivered under the contract?

A. In dollars?

Q. Yes—how many tons and the rate and the amount?

A. 4151 tons and 12 cwt.; the price was $5.10 alongside their vessels; the amount was $21,736.16.

Q. And how much of that has been paid?

A. There has $21,173.16 been paid—leaving a balance of $9,382.62.

Q. Do you wish to correct the amount that has been paid? I think you stated it as the total amount of the bill; do you wish to correct it?

A. I wish to correct it.

Q. What was the amount paid?

A. The amount actually paid was $11,790.50; the full amount of the bill was $21,173.16; the balance due is $9,382.62.

Q. Interest would be from what date; what was the time of the last delivery?

A. The time of the last delivery was March 6, 1925.

Both sides rest.

[fol. 20] LIBELLANT'S EXHIBIT 1

Contract of February 18, 1925

Agreement made at The City of New York, in the State of New York, this eighteenth day of February, 1925, whereby W. A. Marshall & Company, a New York Corporation, with its principal place of business in The City of New York, hereinafter called the Seller, agrees to sell, and American Palestine Line, Inc., a corporation organized under the laws of the State of New York, with its principal place of business in the Borough of Manhattan, in The City of New York, State of New York, as owner of the S/S President Arthur, hereinafter called the Buyer, agrees to buy approximately thirty-six hundred and fifty (3650) gross tons of bituminous coal to be used as bunker fuel for the said S/S President Arthur.

O. K. The coal to be from the Melcroft and Bethel
C. W. S Mines located at Melcroft, Pa., and Holsopple,
O. K. Pa., respectively, approximately fifty per cent.
J. W. G. (50%) of each grade of coal, as per attached circulars.

The Buyer shall have the right, if it so selects, to take samples of the coal while in the railroad cars at Pier Eighteen, Jersey City, N. J. The coal is not to be dumped from the railroad cars into barges until the Seller receives written notice from the Buyer either that it waives its right to

analyze the coal, or has analyzed it and found it satisfactory and directs its dumping.

It is understood that no question as to quality can be raised by the Buyer after the coal has been dumped into barges.

O. K. C. W. S. O. K. J. W. G. The price of the coal is $5.10 a gross ton alongside the said S/S President Arthur, either at Morse's Drydock, Brooklyn, or Pier No. 39 North River, New York City at the option of the Buyer. Delivery [to commence]* [fol. 21] Feby. 20/25 or Feby. 23/25 [and to be completed within]* at option of buyer.

The Buyer will pay for the said coal as follows:

(1) By delivering to the Seller a trade acceptance drawn by it in favor of the Seller, dated the date of the delivery of the coal, due March 10, 1925, covering railroad freight of $2.79 a gross ton, which acceptance is to be endorsed by Jacob Wacht, Jacob S. Strahl and Joseph W. Gottlieb.

(2) A trade acceptance drawn by the Buyer in favor of the Seller, dated on the same day, due May 8, 1925, covering the balance of the purchase price, to wit: $2.31 a gross ton, representing the coal, harbor barge freight and insurance on coal while in barges, which acceptance is also to be endorsed by the said Jacob Wacht, Jacob S. Strahl and Joseph W. Gottlieb.

O. K. C. W. S. O. K. J. W. G. The entire contract between the parties is stated above and there is no outside condition, warranty, agreement or understanding. Certificate of weights according to R. R. bill of lading.

Witness the signatures of the respective parties hereto.

W. A. Marshall & Company, by W. A. Marshall, President. American Palestine Line, Inc., by J. W. Gottlieb, Secy.

[fol. 22] In consideration of the execution of the foregoing contract, and of the delivery of said coal by the

[*Words and figures enclosed in brackets erased in copy.]

Seller to the Buyer, and in consideration of One Dollar ($1.00) paid to each of the undersigned, the receipt of which is hereby acknowledged, we jointly and severally agree to endorse the said trade acceptances described in the foregoing contract between the Seller and the Buyer.

Dated, February 18, 1925.

Jacob S. Strahl, J. W. Gottlieb, Jacob Wacht.

LIBELLANT'S EXHIBIT 2

Letter Head of American Palestine Line, Inc.

New York, N. Y., February 19, 1925.

W. A. Marshall & Company, 25 Beaver Street, New York City.

GENTLEMEN: We refer to our Contract dated February 18, 1925, for the supply of coal aboard the S. S. President Arthur.

This coal is to be delivered alongside the S. S. President Arthur, at Morse Dry Dock & Repair Co., Foot of 56th Street, Brooklyn, N. Y., beginning in the morning, February 20th, 1925, and is to be continually delivered as speedily as possible so as not to hold up the stevedoring thereof. [fol. 23] We waive our right to analyze the coal.

Very truly yours, American Palestine Line, Inc. H. Epstein, General Manager.

he-ra.

LIBELLANT'S EXHIBIT 3

Contract of March 4, 1925

Agreement made at the City of New York, in the State of New York this fourth day of March, 1925, whereby W. A. Marshall & Company, a New York Corporation, with its principal place of business in the City of New York, hereinafter called the Seller, agrees to sell, and American Palestine Line, Inc., a corporation organized under the laws of the State of New York, with its principal place of

business in the Borough of Manhattan, in the City of New York, State of New York, as Owner of the S. S. President Arthur, hereinafter called the Buyer, agrees to buy approximately five hundred and seventy five (575) gross tons of Bituminous Coal to be used as bunker fuel for the said S. S. President Arthur.

The coal is to be from the Melcroft Mine, located at Melcroft, Pa.

The Buyer shall have the right, if it so elects, to take samples of the coal while in the railroad cars at Pier Eighteen, Jersey City, N. J. The coal is not to be dumped from the railroad cars into the barges until the Seller receives written notice from the Buyer either that it waives its right to analyze the coal, or has analyzed it and found it satisfactory and directs its dumping.

[fol. 24] It is understood that no question as to quality can be raised by the Buyer after the coal has been dumped into barges.

The price of the coal is $5.10 a gross ton alongside the said S. S. President Arthur at Pier No. 39, North River, New York City, delivery beginning tomorrow, March 5, 1925.

The Buyer shall pay for the said coal as follows:

(1) By delivering to the Seller a trade acceptance drawn by it in favor of the Seller, dated the date of the delivery of the coal, due March 10, 1925, covering railroad freight of $2.79 a gross ton, which acceptance is to be endorsed by Jacob Wacht, Jacob S. Strahl and Joseph W. Gottlieb.

(2) A trade acceptance drawn by the Buyer in favor of the Seller, dated on the same day, due May 8, 1925, covering the balance of the purchase price, to wit: $2.31 a gross ton, representing the coal harbor barge freight and insurance on coal while in barges, which acceptance is also to be endorsed by the said Jacob Wacht, Jacob S. Stahl and Joseph W. Gottlieb.

The entire contract between the parties is stated above and there is no outside condition, warranty, agreement or understanding. Certificate of weights according to railroad bill of lading.

Witness the signatures of the respective parties hereto.

W. A. Marshall & Company, by W. A. Marshall, President. American Palestine Line, Inc., by J. W. Gottlieb.

[fol. 25] In consideration of the execution of the foregoing contract, and of the delivery of said coal by the Seller to the Buyer, and in consideration of One Dollar ($1.00) paid to each of the undersigned, the receipt of which is hereby acknowledged, we jointly and severally agree to endorse the said trade acceptance described in the foregoing contract between the Seller and the Buyer, dated March 4, 1925.

J. W. Gottlieb, Jacob Wacht, Jacob S. Strahl.

Dated, March 4, 1925.

Libellant's Exhibit 4.

Letterhead of W. A. Marshall & Company

March 4, 1925.

W. A. Marshall & Co., 17 Battery Place, New York City.

Gentlemen: We refer to our contract dated March 4, 1925, for the supply of coal aboard the S. S. President Arthur.

This coal is to be delivered alongside the S. S. President Arthur at Pier #39, North River, New York City, on the morning of March 5, 1925, as per conversation with our Mr. Sabath. We waive our right to analyze the coal.

Yours very truly, American Palestine Line, Inc., by H. Epstein, General Manager.

[fol. 26] Claimant's Exhibit "A"

Letterhead of W. A. Marshall & Company

X-CWS. February 16, 1925.

American Palestine Line, Inc., 1493 Broadway, New York City.

Attention of Mr. Epstein

Gentlemen: We beg to submit a price of $5.10 per gross ton on our Shallmar bunker coal for delivery alongside

the S. S. "President Arthur," Morse Dry Dock, Brooklyn, N. Y., on approximately 3,650 gross tons.

Should we receive this order, we will use the combination of coals that we are in the habit of using on all of our steamship business, which would be approximately 50% of Melcroft coal and about 50% of our Bethel coal. We enclose a descriptive circular on each of these coals. We have had unusually good success with this combination of coals and feel that you will receive equally good results by their use.

Regarding terms of payment, we would require a trade acceptance payable on March 10th for the freight and boat freight which would amount to $3.04 per gross ton, and an additional trade acceptance for the balance, amounting to $2.06 per gross ton; these trade acceptances to be endorsed by responsible persons acceptable to us. Should this be acceptable to you, we would need prompt acceptance of this [fol. 27] order, so that we can start the loading of these boats. We have all of the coal standing at present. The second trade acceptance will be payable May 5th.

Yours very truly, W. A. Marshall & Company.
Charles W. Sandford, Manager Tidewater Dept.

CWS/AW.

c. c. to Mr. J. C. Meyerhoff, 1 Broadway, New York City.

CLAIMANT'S EXHIBIT "B"

$9,382.62. New York, March 6th, 1925.

May 8th, 1925, Pay to the order of W. A. Marshall & Company Nine thousand three hundred and eighty two and 62/100 dollars. Value received and charge the same to account of

W. A. Marshall & Company. David L. Morrison, Treas.

To American Palestine Line, Inc., No. 1493 Broadway, New York City, N. Y.

On the face of the trade acceptance appears the following:

[fol. 28] Accepted—March 6, 1925. Payable at National City Bank, 57th St. office. American Palestine Line, Inc., by James Wacht, Treasurer.

On the reverse side of the trade acceptance appear the following names in the order given:

Jacob Wacht, Jos. W. Gottlieb, Jacob S. Strahl, W. A. Marshall & Co., by David L. Morrison, Treasurer.

CLAIMANT'S EXHIBIT C—AFFIDAVIT OF CHARLES W. SANDFORD

SUPREME COURT, NEW YORK COUNTY

W. A. MARSHALL & COMPANY, Plaintiff,

against

JOSEPH W. GOTTLIEB, JACOB S. STRAHL, and JACOB WACHT, Defendants

Affidavit on Motion for Summary Judgment

STATE OF NEW YORK,
County of New York, ss:

Charles W. Sandford, being duly sworn, deposes and says:

[fol. 29] First. I am Manager of the Tidewater Department of W. A. Marshall and Company, the plaintiff in the above entitled action. In that capacity I negotiated the contract for the sale of certain coal by plaintiff to American Palestine Line, Inc., out of which came the trade acceptance here sued upon. I personally handled, and I am personally familiar with the matters set forth in this affidavit, which is made in support of a motion for summary judgment.

Second. On February 16, 1925, I wrote a letter to American Palestine Line, Inc., offering, on behalf of W. A. Marshall and Company, to sell a stated quantity of specified coal at a stated price. A copy of that letter is annexed to this affidavit as Exhibit "A" and made a part hereof. Further, I quote here the following sentence from that letter

that the court may observe one of the essential terms of the offer:

"Regarding terms of payment, we would require a trade acceptance payable on March 10th for the freight and boat freight which would amount to $3.04 per gross ton, and an additional trade acceptance for the balance, amounting to $2.06 per gross ton; these trade acceptances to be endorsed by responsible persons acceptable to us."

The Contracts

Third. Shortly after I had sent the letter marked Exhibit "A," American Palestine Line, Inc., accepted the offer verbally and followed up that acceptance by executing [fol. 30] a written contract dated February 18, 1925. A copy of that contract is annexed hereto marked Exhibit "B" and made a part hereof. However, at this point, I quote for the benefit of the court, four significant parts of said contract:

(Here follows portions of contract relative to right to analyze the coal and the terms of payment, Libellant's Exhibit No. 1 herein.)

Fourth. Subsequently, on March 4th, American Palestine Line, Inc., believing it would require more coal than that called for in the contract of February 18, 1925, made a second contract with W. A. Marshall and Company for an additional supply of coal amounting to 575 tons. A copy of said contract is annexed hereto, marked Exhibit "C," and made a part hereof. This second contract was practically identical with the first contract except as to dates and the amount of coal to be delivered. It included likewise the provisions quoted above.

(Here follow statements relative to deliveries.)

Trade Acceptances

Tenth. In accordance with the terms of the contracts I presented to the American Palestine Line, Inc., on behalf of W. A. Marshall and Co. two trade acceptances for the balance due on the coal, which were accepted by American

Palestine Line, Inc., and endorsed by Messrs. Gottlieb, Strahl and Wacht, the three individual defendants named in this action. A copy of the second trade acceptance is [fol. 31] hereto annexed, marked Exhibit "L," and made a part hereof. The first trade acceptance was duly paid.

Eleventh. Subsequently, the trade acceptance was presented through the Bank of America.

(Here follows statement that payment was refused and the draft protested for non payment.)

From the foregoing recital of the facts and from the other affidavits submitted upon this motion, it is plain that the defendants have no defense to this action on the trade acceptance. The facts as established by affidavits and exhibits submitted are as follows:

(a) Two contracts for the sale and delivery by plaintiff to American Palestine Line, Inc., of a total of 4225 tons of coal to come from Bethel and Moleroft mines.

(b) Specific provisions in said contracts that the trade acceptances in payment for said coal should be endorsed by the officers of the American Palestine Line, Inc., i. e., Joseph W. Gottlieb, Jacob S. Strahl and Jacob Wacht, the individual defendants in this action.

(c) Endorsements made by these individual defendants as part of the consideration of the sale of said coal by plaintiff to American Palestine Line, Inc.

* * * * * * *

[fol. 32] The claim that the defendants were accommodation endorsers for the benefit of W. A. Marshall and Co. is refuted by the terms of the offer and of the contracts and by their own signatures upon the contracts. Instead of being accommodation endorsers for the benefit of W. A. Marshall and Co., they are in fact straight endorsers, so far as W. A. Marshall and Co. is concerned, for without the consideration of such endorsements, the plaintiff would never have sold the coal to American Palestine Line, Inc.

Fourteenth. I am advised by the attorney for W. A. Marshall and Co. that the so-called defenses in law contained

in the amended answer are without any validity. These defenses are to the effect that there is another action pending in Admiralty in the United States District Court for the Southern District of New York against the S. S. President Arthur on the contracts themselves; and that the complaint is defective in failing to make the American Palestine Line, Inc., a party defendant. I am likewise advised by said Attorney that an action against the S. S. President Arthur in the United States Admiralty Court on the maritime contracts does not prevent an action in the State Court against the endorsers on the trade acceptance, and that in an action against endorsers it is not necessary to join the principal obligor.

* * * * * * *

On the evidence presented in the affidavits submitted in this motion, it is obvious that there is no real issue of fact to be tried and that there is no possible defense of which the defendants could avail themselves upon such a trial. I, [fol. 33] therefore, ask that an order be entered by this court striking out the amended answer of the defendants as a sham and a fraud and directing the entry of summary judgment on behalf of W. A. Marshall and Co. for the full amount demanded.

Charles W. Sanford.

Verified October 2nd, 1925.

CLAIMANT'S EXHIBIT D—AFFIDAVIT OF GEORGE W. HINCKLEY

SUPREME COURT, NEW YORK COUNTY

W. A. MARSHALL & COMPANY

against

JOSEPH W. GOTTLIEB, JACOB S. STRAHL, and JACOB WACHT, Defendants

STATE OF NEW YORK,
County of New York, ss:

George W. Hinckley, being duly sworn, deposes and says: First. I am the attorney for the plaintiff in the above entitled action and am making this affidavit in support of the

[fol. 34] plaintiff's motion for an order striking out the amended answer herein and granting summary judgment to the plaintiff.

* * * * * * *

B. As to the Charge that the Defendants were Accommodation Endorsers for the Benefit of W. A. Marshall and Co., Plaintiff Herein.

Eleventh. Were the defendants accommodation endorsers for W. A. Marshall and Co.? This question of fact is conclusively answered by the affidavit of Mr. Sandford and the annexed exhibits consisting of the offer to sell the coal and the two contracts therefor actually signed. These documents show that W. A. Marshall and Co. offered to sell the coal to the American-Palestine Line, Inc., only on condition that the trade acceptances to be given in payment would be signed by three endorsers acceptable to the plaintiff. The contracts themselves similar in form and for quantities of coal making up the aggregate, show exactly the basis upon which the defendants signed the trade acceptance here sued on. They were straight endorsers so far as W. A. Marshall and Co. is concerned. They gave their endorsements as part of the consideration moving from American-Palestine Line, Inc., to W. A. Marshall and Co. for the purchase of the coal in question. The plaintiff's offer shows that the plaintiff did not rely solely on the credit of the American-Palestine Line, Inc., and that the endorsement of these individual defendants was an essential prerequisite for the purchase of this coal by their corporation. The contract itself demonstrates that these individual defendants understood com- [fol. 35] pletely the significance of their endorsements.

(The language of the contract as to terms of payment is here quoted.)

* * * * * * *

It follows that the allegation of the defendants that they were accommodation endorsers for the benefit of W. A. Marshall and Co. is false and known to them to be false.

* * *

Under such conditions, I submit that the interests of justice and the dignity of this court require the granting of the relief here sought.

George W. Hinckley.

Verified October 15th, 1925.

In United States District Court

[Title omitted]

In Admiralty

Opinion—Sept. 13, 1928

Libel in rem to recover agreed price of bunker coal fur-
[fol. 36] nished to the Steamship "President Arthur."

In March, 1925, the American-Palestine Line, as owner of the S/S "President Arthur," entered into two written agreements with the libellant for the sale of approximately 3,225 gross tons of coal, as each agreement recites "to be used as bunker fuel for the said S/S 'President Arthur.'" Each agreement contains the following provisions with reference to the payment of the purchase price:

"The Buyer shall pay for the said coal as follows:

(1) By delivering to the Seller a trade acceptance drawn by it in favor of the Seller, dated the date of the delivery of the coal, due March 10, 1925, covering railroad freight at $2.79 a gross ton, which acceptance is to be endorsed by Jacob Wacht, Jacob S. Strahl and Joseph W. Gottlieb.

(2) A trade acceptance drawn by the Buyer in favor of the Seller, dated on the same day, due May 8, 1925, covering the balance of the purchase price, to wit: $2.31 a gross ton, representing the coal, harbor barge freight and insurance on coal while in barges, which acceptance is also to be endorsed by the said Jacob Wacht, Jacob S. Strahl and Joseph W. Gottlieb."

The entire contract between the parties is stated above and there is no outside condition, warranty, agreement,

or understanding. Certificate of weights according to railroad bill of lading.

Witness the signatures of the respective parties hereto."

[fol. 37] On each of the said agreements, below the signatures of the parties and above the signatures of the persons named as endorsers of the acceptances to be given by the Purchaser, there appears the following:

"In consideration of the execution of the foregoing contract, and the delivery of said coal by the Seller to the Buyer, and in consideration of One Dollar ($1.00) paid to each of the undersigned, the receipt of which is hereby acknowledged, we jointly and severally agree to endorse the said trade acceptance described in the foregoing contract between the Seller and the Buyer."

The libellant delivered 4,151 tons and 12 cwt. to the vessel. The purchase price, at $5.10 per ton, amounted to $21,736.16. Trade acceptances in this amount were given and received under the agreements. These have not been paid except to the extent of $11,790.50. For the balance of $9,382.62, with interest from March 6, 1925, the libellant claims a maritime lien against the vessel.

George Wright Hinkley, Proctor for Libellant (J. Markham Marshall and George Wright Hinkley of Counsel):

Lampke & Stein, Proctors for Claimant American Palestine Line, Inc. (Chauncey E. Treadwell of Counsel).

THACHER, D. J. (after stating the facts as above):

The rule is settled that when a note of a third party is taken at the time of the creation of a debt, as upon a sale [fol. 38] of goods, the presumption is that it was taken in payment.

Atlas S. S. Co. v. Columbian Land Co., 102 Fed., 358 (C. C. A., 2nd);

N. Y. & Cuba S. S. Co. v. Texas Co., 282 Fed., 221 (C. C. A., 2nd);

Hall v. Stevens, 116 N. Y., 301.

There is no need for such presumption in this case because the agreement expressly required payment coincidentally with the delivery of the coal by delivery of trade acceptances bearing three endorsements. The agreement which the parties made is conclusive, and if there were evidence of intention contrary to its terms this could not be considered. But there was no such evidence. In the face of the agreements no maritime lien could arise, because the coal was to be paid for on delivery. Even if a lien had arisen it certainly could not survive payment in the form the parties expressly contracted for, namely, the delivery of the acceptance. It is entirely clear, I think, that the libellant did not rely on the credit of the ship.

The libellant having no lien, its suit fails and the complaint will be dismissed with costs.

(Sgd.) Thomas D. Thacher, U. S. D. J.

September 13th, 1927.

[fol. 38a] In United States District Court

[Title omitted]

Final Decree—Oct. 10, 1927

This cause having duly come on to be heard in its regular order on June 3, 1927, upon the pleadings and proofs and having been argued and submitted by the advocates for the respective parties and the court, after due deliberation, having rendered its decision dismissing the libel herein, with costs, and claimant's costs having been duly taxed in the sum of $37.90,

Now, on motion of Lampke & Stein, proctors for the claimant, it is

Ordered, adjudged and decreed that the libel herein be and the same hereby is dismissed with costs and that the [fol. 38b] claimant Lawrence S. Greenbaum, Receiver-in-Equity of the American Palestine Line, Inc., recover of the libelant W. A. Marshall & Co., Inc., and its stipulators for costs, the sum of $37.90, costs as taxed, which sum shall bear interest until paid and that the claimant have judgment against the said libelant therefor and it is further

Ordered, adjudged, and decreed that unless an appeal be taken from this decree within the time limited by the rules and practice of this court, that the stipulators for costs on the part of said libelant cause the engagement of their stipulations to be performed within ten days or to show cause within four days thereafter why execution should not issue against them to enforce satisfaction of this decree.

T. D. Thacher, U. S. D. J.

[fol. 39] In United States District Court

[Title omitted]

Notice of Appeal

Sirs: Please take notice that W. A. Marshall & Co., Inc., the libellant herein, hereby appeals to the Circuit Court of Appeals for the Second Circuit, from the Decree of the District Court in this cause, entered the 11th day of October, 1927, and from each and every part thereof.

Dated November 11, 1927.

Yours, etc., George Wright Hinckley, Proctor for Libellant, 50 Broadway, Manhattan, New York City.

To Alexander Gilchrist, Esq., Clerk of United States District Court, Southern District of New York; Lampke & Stein, Esqs., Proctors for Claimant, 29 Broadway, Manhattan, New York City.

[fol. 40] In United States District Court

[Title omitted]

Assignment of Errors

W. A. Marshall & Co., Inc., the libellant-appellant, assigns as errors in the District Court:

1. The finding and decision that libellant had taken the note of a third party.

2. The finding and decision that the provision of the contracts requiring delivery by buyer of its trade acceptances bearing three indorsements, was conclusive proof of intention that such acceptances were taken in absolute payment.

3. The finding and decision that there was no evidence that buyer's trade acceptances bearing three indorsements were not taken in absolute payment.

4. The decision that evidence was not admissible that buyer's acceptances bearing three indorsements were not taken in absolute payment.

5. The finding and decision that no maritime lien could arise in the face of the agreements of the parties.

[fol. 41] 6. The finding and decision that even if a maritime lien had arisen it could not have survived the taking by the seller of buyer's acceptances bearing three indorsements.

7. The finding and decision that it was entirely clear that libellant did not rely on the credit of the ship.

8. The decision that claimant was entitled to a decree dismissing the libel.

9. The failure of the District Court to find and decide that libellant was entitled to a decree for the full amount claimed with interest and costs.

George Wright Hinckley, Proctor for Libellant-Appellant. Office and Post Office address: No. 50 Broadway, Manhattan, New York City.

[fol. 42] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

Dated December 1, 1925.

George Wright Hinckley, Proctor for Libellant.
Lampke & Stein, Proctors for Claimant.

[fol. 43] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 44] In United States Circuit Court of Appeals for the Second Circuit, October Term, 1927

No. 233

Argued March 14, 1928. Decided April 9, 1928

W. A. Marshall & Co., Inc., Libelant-Appellant,

v.

Steamship President Arthur, Her Engines, Boilers, etc., Claimant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, L. Hand, and Augustus N. Hand, Circuit Judges

Opinion

Appeal from the District Court for the Southern District of New York. Libel filed by W. A. Marshall & Co., Inc., to enforce a maritime lien against the steamship President Arthur for coal supplied. Decree for claimant; libelant appeals. Affirmed.

George Wright Hinckley, of New York City, for appellant.

Lampke & Stein, of New York City (Chauncey E. Treadwell, of New York City, of counsel), for appellee.

Saul S. Myers, John M. Woolsey, and Joseph K. Guerin, all of New York City, amici curiæ.

Manton, Circuit Judge.

In March, 1925, appellant supplied bunker coal to the President Arthur and seeks to enforce a lien for a balance unpaid. It is not denied that the coal was supplied, but it is contended by the appellee that the coal was supplied pursuant to written contract providing for payment on deliv-

ery by giving a trade acceptance indorsed by three individuals, and it is asserted that by reason thereof no maritime lien exists against the vessel. The contract provided:

"The buyer will pay for the said coal as follows:

"(1) By delivering to the seller a trade acceptance drawn by it in favor of the seller, dated the date of the delivery of the coal, due March 10, 1925, covering railroad freight of $2.79 a gross ton, which acceptance is to be indorsed by Jacob Wacht, Jacob S. Strahl, and Joseph W. Gottlieb.

"(2) A trade acceptance drawn by the buyer in favor of the seller, dated on the same day, due May 8, 1925, covering the balance of the purchase price, to wit, $2.31 a gross ton, representing the coal, harbor barge freight and insurance on coal while in barges, which acceptance is also to be indorsed by the said Jacob Wacht, Jacob S. Strahl, and Joseph W. Gottlieb.

"The entire contract between the parties is stated above, and there is no outside condition, warranty, agreement, or understanding."

After the signature on the contract, it is provided:

"In consideration of the execution of the foregoing contract, and of the delivery of said coal by the seller to the buyer, and in consideration of one dollar ($1.00) paid to each of the undersigned, the receipt of which is hereby acknowledged, we jointly and severally agree to indorse the said trade acceptances described in the foregoing contract between the seller and the buyer."

On February 15, 1925, the appellant's sales manager testified that they looked into the financial standing of the owners of the vessel and came to the conclusion that they did not like the account and wanted to get trade acceptances [fol. 45] in order "to get the money at any time they wanted—in fact to discount that paper." And he said, "We were not satisfied with the credit of the American-Palestine Line." He wrote appellee on February 16th that they wanted trade acceptances to be indorsed by three responsible persons acceptable to them. He testified further that they did not consider the Palestine Line financially responsible, and insisted upon the indorsement so that they could discount the paper "in case we need it at any time."

It is significant that the agreement provides that the indorsements were made by these individuals as part of the consideration of the sale of the coal, and it was sworn in an affidavit that, without the consideration of such indorsements, the appellant would never have sold the coal to the American-Palestine Line. There was "no outside condition, warranty, agreement or understanding." Thus it appears that the credit of the ship was not accepted by the appellant, but, by the contract of the parties, trade acceptances with three indorsers were insisted upon, and everything for which the appellant had contracted was given in payment. Cash was not contracted for, but payment other than cash was accepted. It was, as said by Chief Justice Taney in Phelps v. The Camilla, Taney 400, Fed. Cas. No. 11073 (Md. 1838):

"If the party does not choose to rely on the contract which the maritime law implies in such cases, but takes an express written contract, he must rely on the contract he makes for himself, and cannot, upon a change of circumstances, resort to the securities upon which, in the absence of any special agreement, the law presumes that he relied; and if he takes a note or bill of exchange, or any other personal engagement for the payment of the debt, he is presumed to rely on this personal security, and to waive his lien, unless he stipulates that the liability of the vessel shall still continue."

This rule has not been departed from by authoritative decisions. See Segrist v. Crabtree, 131 U. S. 287, 9 S. Ct. 687, 33 L. Ed. 125; McMurray v. Brown, 91 U. S. 257, 23 L. Ed. 321; N. Y. & Cuba S. S. Co. v. Texas Co. (C. C. A.) 282 F. 221; Atlas S. S. Co. v. Columbian Land Co. (2 C. C. A.) 102 F. 358.

The Merchant Marine Act of 1920 (46 U. S. C. A. § 974; Comp. St. § 8146¼ppp) provides that:

"Nothing in this section shall be construed to prevent the furnisher of repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, or the mortgagee, from waiving his right to a lien, or in the case of a preferred mortgage lien, to the preferred status of such lien, at any time, by agreement or otherwise."

To support a lien, the act provides "it shall not be necessary to allege or prove that credit was given to the vessel." Nothing in the act bars proof that whatever was furnished

was furnished on the mere credit of the owner or third party and in no sense upon the credit of the ship. Ely v. Murray (C. C. A.) 200 F. 368. A lien does not exist where the supplies are furnished on the mere credit of the owner. The Cora P. White (D. C.) 243 F. 246. There is marked distinction between the effect of taking a note for an obligation which already existed, and agreeing in a contract which referred to an obligation hereafter to arise, that the payment of that obligation must be made by promissory note. The trade acceptance, assuming a default in payment, permitted the appellant to sue the indorsers. This it did.

The maritime lien is not to be given a broad legal interpretation, nor is it to be extended by construction, analogy, or inference. Osaka Shosen Kaisha v. Pacific Export Lumber Co., 260 U. S. 490, 43 S. Ct. 172, 67 L. Ed. 364; Piedmont Coal Co. v. Seaboard Fisheries Co., 254 U. S. 1, 12, 41 S. Ct. 1, 65 L. Ed. 97. Where parties agree to an express contract as to payment, the contract becomes extinguished by full performance and so it is impossible that either party should have any claim against the other arising out of the contract. No lien can exist in favor of the materialman when he receives in payment that for which he stipulated when the contract was made.

In The Bird of Paradise, 5 Wall. 545, 18 L. Ed. 662, referred to by appellant, a lien was asserted for freight. That lien differs from a maritime lien for repairs because a ship is bound to the cargo until delivery or tender of delivery and equally is the cargo bound to the ship for the payment of freight. The freight contract provided that it should be paid in Liverpool on unloading and right delivery of the cargo. Construing the clauses of the bill of lading together, it was clear that the charterer was not obliged to pay the freight until tender of delivery. While the charterer did give the first acceptance, he failed in business, and the acceptance was dishonored before the arrival of the ship, and he never gave or tendered the second acceptance mentioned in the charter party. It was held that [fol. 46] the lien remained. The court stated that the freight lien "stands upon the same ground with the lien of the carrier on land, and arises from the right of the shipowner to retain the possession of the goods until the freight

is paid, and is lost by an unconditional delivery to the consignee." And that the freight lien "may be modified, or it may excluded, or displaced by direct words, or by the insertion of some stipulation wholly incompatible or irreconcilable with the existence of such a right." Requiring the appellee to procure indorsements of three separate individuals was such a stipulation as is referred to in the language quoted, and the appellant relied solely upon the indorsements and not on the maritime lien, for it refused to sell until it had the agreed indorsements.

Decree affirmed.

[fol. 47] In United States Circuit Court of Appeals

No. 233

October Term, 1927

Argued March 14, 1928. Decided April 9, 1928

[Title omitted]

Dissenting Opinion

L. Hand, Circuit Judge (dissenting): There are two questions at issue—first, whether the acceptances were a payment; if not, whether their receipt by the libelant was a "waiver" (of) "his right to a lien * * * by agreement or otherwise." If the claimant had not been a party to the acceptances, it may be assumed that they would have been a payment. Atlas S. S. Co. v. Colombian Land Co., 102 F. 358 (C. C. A. 2); N. Y. & Cuba S. S. Co. v. Texas Co., 282 F. 221 (C. C. A. 2); Hall v. Stevens, 116 N. Y. 201, 22 N. E. 374, 5 L. R. A. 802. If, on the other hand, it had agreed only to deliver its note, and had done so, the note would not have been a payment. The doctrine that a note, in the absence of an agreement to that effect, is not payment, is not limited to cases where it is given upon a pre-existing debt, but equally applies when the only promise is to deliver it. The Bird of Paradise, 5 Wall. 545, 18 L. Ed. 662; Reed v. Van Ostrand, 1 Wend. (N. Y.) 424, 19 Am. Dec. 529; Combs v. Bateman, 10 Barb. (N. Y.) 573. Logically, it

is true, the promise is performed when the note is delivered, but the law looks to the essence, which is the payment of the money, of which the note is only another promise. When the buyer is to deliver the note of another person he has never agreed to pay at all, but if he joins in the paper, the presence of other obligors does not affect his primary obligation. As he still remains liable, he has never paid.

The question of "waiver" is more difficult. Under the maritime law, the cases were in great conflict as to what security taken at the time forbade the inference that the buyer meant to rely on the ship. The strongest case for the claimant is a bottomry bond, and this was held to "waive" the lien. The Ann C. Pratt, Fed. Cas. No. 409, affirmed sub nom. Carrington v. The Ann C. Pratt, 18 How. 63, 15 L. Ed. 267. It would seem that a mortgage was equally strong evidence of the same intent, but the decisions are at variance. In The A. R. Dunlap, Fed. Cas. No. 513, The D. B. Steelman (D. C.) 48 F. 580, The Thomas Morgan (D. C.) 123 F. 781, The Cimbria (D. C.) 214 F. 128, and The Fairhope (D. C.) 235 F. 1007, the lien survived such a mortgage, but not in The Lucille (D. C.) 208 F. 434, and The Yankton (D. C.) 7 F. (2d) 384.

Other kinds of security have also an equivocal effect. The Circuit Court of Appeals for the Fifth Circuit held that a wharfinger's lien was not waived by taking a surety bond in advance (El Amigo, 285 F. 868), and [illegible] lien was not waived by retaining title to the machinery installed (Ricou v. Fairbanks, Morse & Co. [C. C. A.] 11 F. [2d] 103). The Pearl (D. C.) 189 F. 540 and The E-270 [fol. 48] (D. C.) 16 F. (2d) 1005, are in accord with the last case. The acceptance of an unindorsed note of the owner is not a "waiver." The Kimball, 3 Wall. 37, 18 L. Ed. 50; The Bird of Paradise, 5 Wall. 545, 18 L. Ed. 662, supra. Judge Brown held the same of the note of a third person in The James T. Easton (D. C.) 49 F. 656, and Judge Betts in The Active, Fed. Cas. No. 34. In Moore v. Newbury, Fed. Cas. No. 9772, and The Theodore Perry, Fed. Cas. No. 13879, the same was held as to indorsed paper, taken, however, after the goods had been sold. Justice Miller on the other hand held flatly the contrary at Circuit (Taylor v. Commonwealth, Fed. Cas. No. 13787), even though the note

was in fact never delivered. On the facts it is hard to see how this conclusion could have been reached. In Phelps v. The Camilla, Fed. Cas. No. 11073, Chief Justice Taney at Circuit decided that when the sellers took notes of the ship's agent, they showed that they meant to rely upon them and not upon the ship, and he added obiter that the taking of a note would have released a lien anyway.

Mechanics' liens are not released by a reservation of title (Chic. & Alton R. R. Co. v. Union Rolling Mill Co., 109 U. S. 702, 3 S. Ct. 594, 27 L. Ed. 1081; Leschen, etc., Co. v. Mayflower, etc., Co., 173 F. 855, 35 L. R. A. [N. S.] 1 [C. C. A. 8]; Hooven, etc., Co. v. Featherstone, 111 F. 81, 95 [C. C. A. 8]), nor by taking other security (Smith v. Butts, 72 Miss. 269, 16 So. 242; Hinchman v. Lybrand, 14 Serg. & R. [Pa.] 32; Phelps Lumber Co. v. McDonough Mfg. Co., 202 F. 445 [C. C. A. 9]). Perhaps this is because such liens are favored, unlike maritime liens or those of vendors. Cortelyou v. Lansing, 2 Cai. Cas. [N. Y.] 587; Williams v. Roberts, 5 Ohio, 35; Griffin v. Blanchar, 17 Cal. 70.

It must be confessed, therefore, that the decisions are confused and that on authority the case might go either way. Before 1910 the question was whether the seller had shown that he had taken the credit of the ship and not that of the owner, though prima facie he succeeded if the ship were in a foreign port. The statute has, however, changed the burden (Piedmont Coal Co. v. Seaboard Fisheries Co., 254 U. S. 1, 12, 41 S. Ct. 1, 65 L. Ed. 97), because it establishes the lien whenever the goods are ordered by any of the specified persons. Why should the seller not want some added security, or be understood to take the note in substitution for the lien?

The claimant must show just that; he must affirmatively prove, there being no agreement and no estoppel, that the parties could not have intended both securities to stand together. I can find no warrant for so strong a conclusion. Maybe, if the libelant still had the burden, this evidence would not show positively enough that he had given credit to the ship. But he has not got to do that any longer; the boot is on the other leg, and the claimant must show that the lien was released, for that, in substance, appears to me to be the equivalent of "waived" under these circumstances.

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The proof falls far short of that. Courts may still look jealously at maritime liens, but the statute has accomplished something and that in their favor. If it has not even gone so far as meets the libelant's needs here, I should think it had done nothing at all. I think that the decree should be reversed.

[fol. 49] In United States Circuit Court of Appeals, Second Circuit

W. A. Marshall & Company, Inc., Libellant-Appellant,

v.

Steamship "President Arthur," American Palestine Line, Claimant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

Decree—Filed April 16, 1928

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, affirmed, with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

M. T. M. L. H.

[File endorsement omitted.]

[fol. 50] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 51] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 15, 1928

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 33,581. U. S. Circuit Court of Appeals, Second Circuit. Term No. 272. W. A. Marshall & Co., Inc., petitioner, vs. Steamship "President Arthur," her engines, boilers, etc. Petition for writ of certiorari and exhibit thereto. Filed July 14th, 1928. File No. 33,581.